Supreme Court, U.S.
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No. 88-1970

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

BURNING TREE CLUB, INC., *et al.*,
Petitioners

v.

STATE OF MARYLAND, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

BRIEF OF THE NATIONAL CLUB ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF THE NATIONAL CLUB ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

The National Club Association respectfully submits this brief as *amicus curiae* in support of the Petition for a Writ of Certiorari of the Burning Tree Club, Inc., et al.*

INTEREST OF AMICUS

The National Club Association (NCA) is a non-profit national association representing approximately one thousand private social clubs throughout the country variously devoted to golf, tennis, hunting, fishing, yacht-

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* The parties have consented to the filing of this brief *amicus curiae*. The letters giving consent were filed with the Court separately.

ing and friendship. They are united by a desire to preserve their private status and to preserve the use of their property (especially the hunting, fishing and golf clubs) for scenic, park and environmental uses. As a representative of private clubs NCA has become an advocate of private status,[1] and, as such, speaks with authority for all private clubs, members or non-members, on the Constitutional right of intimate association.

Burning Tree Club, Inc. (Burning Tree), a club with an all-male membership devoted solely to encouraging the game of golf, is a member of NCA, as are numerous other single-gender, single-purpose clubs. In addition, there are uncounted single gender clubs, fraternal organizations and other societies devoted to a range of activities and interests. Single-gender does not mean all male. As the list attached as Appendix A indicates, there are well over 17,000 women in the Annapolis area alone (not counting the thousands of women in auxiliaries of men's organizations) who have chosen to associate only with other women for sororal, musical, athletic, business, professional, community and political purposes—just as some men do. It would be difficult to find a city in America that did not have such single-gender organizations.

If Burning Tree differs from these and other clubs it is in desiring, and deserving, an extra measure of privacy. The Club was founded in 1922 by a few congenial and avid sportsmen fondly dedicated to the game of golf. They confirmed their mutual dedication by purchasing a 225-acre plot of land upon which they built a golf course. For 67 years those men and their successors have remained faithful to their charter "to promote and encourage the game of golf".

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[1] For example, NCA is a member of CONPOR which appeared as an amicus in *New York State Club Association v. New York City*, —— U.S. ——, 108 S. Ct. 2225 (1988); representatives of NCA have testified throughout the country where legislatures were considering proposals to curtail the privacy of clubs.

Consistent with that non-business purpose, the Club has shunned publicity. The entrance to its property is not even marked. Aside from the golf course itself, the Club's property contains only appurtenant maintenance facilities and a simple clubhouse. The clubhouse is so modest that two-thirds of it are devoted to essential locker and shower facilities. The small non-locker and non-shower remainder consists of an entrance hall, administrative office, small dining area and adjoining lounge. The two or three-person kitchen staff only serves breakfast and lunch, not dinner, and the entire building closes at 7:00 P.M.

The State of Maryland concluded that Club's limited facilities allow members only the opportunity to play golf and enjoy its "attendant pastimes". It also has found that accomodating women in these Spartan facilities would require substantial additions, which would, in turn, require re-configuring the golf course.[2]

Just as the Club's facilities are limited, so is its membership, with only 250 resident members, the minimum necessary to allow the Club to pay its expenses without raising dues to prohibitive levels. As the State admitted in its Answer (p. 6) to Burning Tree's Amended Complaint, Burning Tree is "a small, highly selective club composed of men who are chosen on the basis of their congeniality with one another and their devotion to the game of golf." (Amended Complaint, p. 9.) New members are selected only after they have been proposed by an existing member, and successful candidates are inevitably known by the members before they become members. The "decisive criteria" are the candidate's "com-

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[2] Affidavit of T. Eloise Foster, letter dated 2/15/78 from Jon F. Oster, Assistant Attorney General, to M. Everett Parkinson, President of Burning Tree.

patibility with the Club's members" and "dedication to the game of golf." (p. 108a.)[3]

The result is an "intimate club" with a "unique camaraderie among the membership". (p. 111a.) The Club is "a quiet and relaxing retreat where members can escape the cares of work and pressures of the outside world" and instead enjoy "a feeling of fraternity", *id.* To preserve this special atmosphere, Club policy specifically forbids business discussions (p. 107a). The state has never adduced evidence that business is transacted at the Club. Indeed, the evidence is to the contrary as neearly one-quarter of the members are retired. (p. 95a.)

The State of Maryland has found Burning Tree does not discriminate on the basis of race, color, creed or national origin. It lacks the facilities to accommodate women (Answer to Questionnaire, 5/13/75). Nonetheless, because of Burning Tree's membership practices, the State of Maryland enacted legislation purporting to void an "open space" agreement which it had signed with the club, by which the Club agreed to forego developing its property in exchange for the State's assurance that it would assess the Club's land in its actual undeveloped state. As a result, the Club would pay millions of dollars less in taxes and the citizens would receive a substantial environmental benefit.

The Maryland Court of Appeals upheld this extraordinary action in the decision for which Burning Tree seeks a writ of *certiorari.*

Given the unchallenged facts which demonstrate Burning Tree's private status, it is nearly certain that a decision contrary to Burning Tree would adversely affect NCA's members as well as the many other private clubs which are potential members of NCA.

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[3] Page references followed by the letter "a" are to the Appendix attached to Burning Tree's Petition for Certiorari.

SUMMARY OF THE ARGUMENT

A distinctly private club, Burning Tree is entitled to the protection of the First Amendment right of free association. In unilaterally revoking a mutually agreed upon "open space" agreement because it did not like the Club's membership policies, the State unconstitutionally punished the Club for the exercise of that right. In addition, the Court of Appeals for Maryland failed to balance the petitioners' strong and substantial rights against the highly attenuated interest of the State in who plays golf on the Club's private property and enters the locker room and other areas of the clubhouse.

ARGUMENT

THE MARYLAND COURT ERRED BY FAILING TO ACCORD BURNING TREE AND ITS MEMBERS THE PROTECTION OF THE FIRST AMENDMENT FREEDOM OF ASSOCIATION.

I. BURNING TREE AND ITS MEMBERS ARE ENTITLED TO A HIGH DEGREE OF PROTECTION UNDER THE FIRST AMENDMENT OF FREEDOM OF ASSOCIATION.

The freedom of association is a First Amendment right[4] which protects non-political associations which provide "social, legal, and economic benefits" to the members. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965). It is inherently necessary to make the express guarantees of the First Amendment fully meaningful. *Id.* It includes the right to join a group. *Id.*

This Court has decided two cases, *Roberts v. Jaycees*, 468 U.S. 609 (1984) and *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537

[4] Courts have also found authority for free association in the Ninth Amendment. *Merriken v. Cressman*, 364 F. Supp. 913 (E.D. Pa. 1973). *Martin v. Covington, Kentucky*, 541 F. Supp. 803 (E.D. Ky. 1982)

(1987)[5] which delineated some of the broad principles of the freedom of association, but it has not yet decided a case juxtaposing a strong claim of privacy and the attenuated interest of the State presented here.

Both *Roberts* and *Rotary* involved local chapters of large national organizations active in business and community activities. Burning Tree, on the other hand, more nearly fits the *Griswold* model of "an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." *Griswold*, 381 U.S. at 486.

The irony is that the *Griswold* model describes marriage, and NCA does not claim that the members of Burning Tree share a level of intimacy approaching that of spouses. Instead, NCA respectfully submits that the broad principles of *Roberts* and *Rotary* concerning business-oriented clubs do not alone provide sufficient guidance to private clubs, especially to single-gender clubs.

In *Roberts*, 468 at 620, this Court enunciated several factors ("size, purpose, policies, selectivity, congeniality" plus the "seclusion from others in critical aspects of the relationship") intended to determine where on the "broad range of human relationships", from "most intimate to most attenuated", to place a particular association of people. It did not, however, indicate how to weigh those factors.

NCA asserts that selectivity and a non-business purpose are decisive and that all other relevant elements flow naturally from that factor. For example, a truly selective

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[5] In a third case, *New York Club Association v. City of New York*, *supra*, this Court ruled that a local ordinance was not invalid on its face when the City asserted that it could be administered with sufficient flexibility to protect private clubs' freedom of association. Because the challenge did not involve an actual application of the statute, the Court did not specifically apply *Roberts* or *Rotary*.

group will choose its members on the basis of congeniality, measured both by their inter-personal agreeability and by their devotion to the purpose and policies of the group. Similarly, a truly selective group will minimize non-member use of its facilities. Because size is only relative, it offers no more real insights into the intimacy of private clubs than of families.

The group's purpose and policies are relevant only if they are business related, because just as non-commercial speech is more highly protected than commercial speech, *Valentine v. Christensen*, 316 U.S. 52 (1942), *Breard v. City of Alexandria*, 341 U.S. 622 (1951), *reh. den.*, 342 U.S. 843, presumably a non-business association is more protected than a business association.[6]

Finally, a truly selective group will naturally exclude others from "critical aspects" of its activities, such as organization and administration, which will be run by members.

Burning Tree illustrates these points perfectly. As a highly selective club, its membership is definitely congenial, small and devoted to a sport, which is a decidedly non-business purpose and policy. The State has conceded, and the record establishes, those facts. Thus, the sportsmen who comprise the Club enjoy the rare camaraderie which always grows from a small group's special dedication to a purpose which is far more important, and comprehensible, to them than to the disinterested public.

Concerning purpose and policies, the undisputed record demonstrates that the Club is devoted entirely to the game of golf, not business, and that the Club's policies discourage the conduct of business on the Club's premises. The Club's modest facilities are entirely devoted to that pastime, to the extent that the clubhouse is more locker room than anything else.

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[6] In this respect, *Breard* is also enlightening because there this Court concluded that the right to privacy enjoyed by a householder outweighed the right of commercial speech of a magazine seller.

Finally, there is no doubt that the Club excludes outsiders from its critical activities. Even its guest policy is extremely limited.

In sum, there can be no doubt that Burning Tree is a very private club fully entitled to the protections of the freedom of association. It is necessary for this Court to examine and weigh these relevant elements to reassure other similarly situated organizations of mutually devoted individuals and thus to prevent the chilling effect of other governmental threats proliferating in the wake of the *New York City* case, *supra*.[7]

II. THE MARYLAND COURT ERRED BY ALLOWING THE STATE TO PUNISH BURNING TREE AND ITS MEMBERS, BY NULLIFYING THE "OPEN SPACE" AGREEMENT, FOR EXERCISING THEIR FREEDOM OF ASSOCIATION.

In erroneously dismissing Burning Tree's claim that the State's nullification of the "open space" agreement punished the Club for exercising its rights, the Court of Appeals seriously misapplied the line of cases consisting of *Speiser v. Randall*, 357 U.S. 513 (1958), *Perry v. Sinderman*, 408 U.S. 593 (1972), *Regan v. Taxpayers with Representation*, 461 U.S. 540 (1983), and *Bob Jones University v. United States*, 461 U.S. 574 (1983). The Court mistakenly read the first two decisions as being inconsistent with the latter two, ignoring the overriding principle for which they stand, that governments cannot punish people for exercising their rights.

First Amendment freedoms are not absolute and may be regulated under carefully controlled circumstances. See, e.g., *Wayte v. California*, 470 U.S. 598 (1985), *Cohen v. California*, 403 U.S. 15 (1971), *reh. den.*, 404

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[7] According to NCA's records, since that decision at least 24 separate statutes, ordinances and regulations have been proposed, passed or approved which would curtail the membership policies of private clubs.

U.S. 896, *United States v. O'Brien*, 391 U.S. 367 (1968), *Breard v. City of Alexandria, supra, Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961), *reh. den.*, 365 U.S. 856, *Paulos v. State of New Hampshire*, 345 U.S. 395 (1953), *reh. den.*, 345 U.S. 978, *Dennis v. United States*, 341 U.S. 494 (1951), *reh. den.*, 342 U.S. 842, reh. *den.*, 355 U.S. 936. The general rule is that such regulations must be content neutral, *Young v. American Mini Theatres*, 427 U.S. 50 (1976), *reh. den.*, 429 U.S. 873; also see, *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972). Any regulation of content is subject to great scrutiny, *Widmar v. Vincent*, 454 U.S. 263 (1981), *Consolidated Edison Co. of New York v. P.S.C. of New York*, 447 U.S. 530 (1980).

Consistent with these principles, the *Speiser* line of cases demonstrates that the State cannot punish those who exercise their lawful rights merely because they may be out of step with current majority thinking. In *Speiser*, this Court declared that a veteran's free speech was unconstitutionally chilled when the State withdrew a valuable tax exemption, available to all veterans, when that veteran refused to take a loyalty oath. In *Perry*, this Court ruled that the State of Texas could not fire a teacher at a State school because he had exercised his First Amendment rights by critizing school officials. In *Regan*, this Court affirmed the denial by the Internal Revenue Service of a lobbying organization's tax exempt status when that denial was content neutral and did not punish the taxpayer for the exercise of First Amendment rights. In *Bob Jones University*, this Court decided that the taxpayer had never properly qualified as a charity, so revoking its tax-exempt status was not a punishment at all.[8]

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[8] This Court's affirmance of *Green v. Connally*, 330 F. Supp. 1150 (D.C.D.C. 1971), aff'd *sub nom. Coit et al. v. Green*, et al., 404 U.S. 997 (1971), also mentioned by the Maryland Court, applied the same reasoning.

Clearly the State's unilateral nullification of an agreement worth millions to Burning Tree is a punishment of the Club for having exercised its Constitutional right of association in a manner not preferred by the State. The State has never claimed that the "open space" agreement had been improperly entered into, so the reasoning employed in *Bob Jones* to deny a tax exemption does not apply. Similarly, the reasoning used in *Regan v. Taxpayers with Representation* to revoke a tax exemption does not apply because there the government action was content neutral, whereas Maryland's legislature specifically amended its legislation in order to harm the Club because of the manner in which its members exercised their First Amendment freedom of association.

The reasoning of *Speiser* and *Perry* is definitely applicable. Both of those cases reversed adverse State action directed against the particular exercise of First Amendment rights. California's special property tax exemption could not be conditioned upon a loyalty oath; the Texas teaching position could not be conditioned upon a teacher refraining from criticizing officials. The continued validity of an existing and mutually binding "open space" agreement could not be conditioned upon a particular exercise of the freedom of association.

It was spurious for the Court to reason that Burning Tree's rights were not being infringed because it could still choose its members freely if it would forego the benefits of the "open space" agreement. That specious argument has no more validity here than in *Speiser*, where the veteran could have foregone the property tax exemption, or in *Perry*, where the teacher could have sought employment elsewhere.

III. THE MARYLAND COURT ERRED IN FINDING THAT THE STATE'S INTEREST IN DETERMINING WHO WOULD PLAY GOLF AT BURNING TREE OUTWEIGHED THE MEMBERS' FIRST AMENDMENT FREEDOM OF ASSOCIATION.

The Maryland Court completely failed to engage in the balancing of interests required whenever the State attempts to curtail First Amendment rights. Here the State's action exceeded the permissible regulation allowed by the clear standards enunciated by this Court in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), which said:

> . . . a government regulation is sufficiently justified . . . if it furthers an important or substantial interest; . . . and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

The same calculus is required in determining whether the State may encroach upon a particular human relationship. The *Roberts* and *Rotary* cases focused on the human relationships and found them so distant and business-oriented that they were easily outweighed by the state's interest in eradicating discrimination against women in commerce.

A different situation is involved here. The restriction upon First Amendment freedoms is far more than incidental and neutral. The degree of intimacy is far higher than in *Roberts* and *Rotary*, and the cause of women will not be significantly advanced by playing golf at and entering the locker room precincts of Burning Tree. The State has never claimed that women are being foreclosed from playing golf elsewhere, and they are not. The State has never indicated that the status of women is reduced because they cannot play at Burning Tree, and it is not. The State has never claimed that the Burning Tree is a business club, like the Jaycees and Rotary, and it is not. It has never asserted that exclusion from Burning

Tree means exclusion from business opportunities, and it does not.

Instead the State has asserted the necessity to remove the supposed imprimatur which the open space agreement confers upon Burning Tree's policy of excluding women. No such imprimatur exists or can be implied. All that can be implied from the open space agreement between the State and Burning Tree is that the clean air, green spaces and other environmental benefits flowing from Burning Tree are as healthful and beneficial to the public as those from other undeveloped lands which are also subject to similar agreements.[9]

In callously disregarding that signed agreement, the State has set at nought the valuable constitutional rights of this small Club and its few members. In upholding that high-handed action, the Maryland Court erroneously failed to examine the State interest involved here. If it had, it would have seen that the only right is that of playing golf on private property and that the rest is symbolism. Symbolism must now bow to the very real and substantial rights of the members of Burning Tree to associate freely *in private* with whomever they please.

CONCLUSION

This Court has stated that the freedom of association is a First Amendment right and that intimate associations are thereby protected. Yet, the only guidelines provided by this Court are for the most intimate relationships of the family and the least intimate relationships of business. Between those poles are those deep, non-

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[9] It should be emphasized that the Club's lower taxes resulted from bargaining away valuable rights, not from an exemption granted out of largesse. "Valuation consistent with restricted use does not amount to an exemption." *Tarrant Appraisal District v. Colonial Country Club*, No. 2-87-224-CU, Court of Appeals, Second District of Texas (March 8, 1989), slip p. 5.

family, non-business attachments which enrich us all and which merit a high degree of protection.

The lack of guidelines allows aggressive legislative majorities to invade the privacy of the few, and even punish them, without concern for the damage which can be done. The Maryland Court failed to recognize Burning Tree's legitimate right to First Amendment protection; it failed to balance that right against the minimal State interest involved.

For the foregoing reasons, this Court should issue a writ of certiorari.

Respectfully submitted,

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July 5, 1989

APPENDIX A

APPENDIX A

ANNAPOLIS LODGE NO. 622

Benevolent and Protective Order of Elks
Instituted October 23, 1900
P.O. Box 1888
Rowe Blvd. and Taylor Ave.
Annapolis, Maryland 21404
Telephone: (301) 263-2891

James C. McNamara, P.E.R., Secretary
Kenneth D. Webb, P.E.R., Treasurer

February 24, 1989

Brother Edward W. Seddon
D.D.G.E.R.
9730 MCovered Wagon Drive
Laurel, MD 20707

Dear Brother Ed,

Pursuant to your February 10th request, please find the attached list of all female organizations in our area. Because of the time limitations and the reluctance of some organizations to provide all of the requested information, this list is incomplete. You may note we have not listed the auxiliary units supporting the Elks, Moose, American Legion, etc. Should you desire additional information or wish to have us expand our list, please do not hesitate to contact us.

Fraternally,

ROBERT J. CAMPBELL
Exalted Ruler

Copies to:

Brother Homer Huhn, Jr., P.G.E.R.
Brother Raymond Settler, Govt. Rel.

Enclosure

A.A. Co. Commission for Women,
94 Franklin Street
Annapolis, MD 21401
Jean Melton, Director
Commission of 16 Women

College Womens Club,
1716 Cedar Park Road,
Annapolis, MD 21401
Mrs. M. Breuneinan, President
60 Members

Women's Club of Linthicum,
317 Ardmore Road,
Linthicum, MD 21090
Mrs. Chas. West, President
200 Members

American Assoc. of University Women,
3301 Kenney Ct.
Edgewater, MD 21037
Marion Jo Meizner, **
50 Members

League of Women Voters of MD.,
200 Duke of Gloucester St.
Annapolis, MD 21401
Priscilla Hart, President
2,900 Members

Alpha Kappa Alpha Sorority,
41 Hicks Ave.,
Annapolis, MD 21401
Mrs. Hanna Chambers, President
42 Members

Delta Sigma Theta Sorority,
Box 1647,
Annapolis, MD 21401
Ida Rogers, ***
60 Members

Y.W.C.A. of A.A. Co.,
40 State Circle,
Annapolis, MD 21401
Doloros Bail, **
12,000 Members

MD. Federation of Women's Clubs,
2104 Bay Front Terrace,
Annapolis, MD 21401
Mrs. John Crippen, President
600 Members

Frontiers Wives,
1955 Forest Drive
Annapolis Drive
Annapolis, MD 21401
Mrs. Irene Mills, **
50 Members

MD. Federated Women's Club,
Southern Dist.
8100 Canterburg Drive
Frederick, MD 21701
Mrs. R. Brust, President
300 Members

Women's Club of Annapolis,
866 Woodmont Road,
Annapolis, MD 21401
Mrs. Everett Lehmann, **
53 Members

Lioness Club,
9 Bristol Circle,
Annapolis, MD 21401
Angie Barrett, Chairperson
30 Members

National League of Penwomen,
3478 So. River Terrace,
Edgewater, MD 20895
Mrs. Geo. Jacobi, President
25 Members

Order of Eastern Star,
162 Conduit Street,
Annapolis, MD 21401
Lucille Anderson, President
250 Members

Panhellenic Club,
4 Spendrift Drive,
Annapolis, MD 21403
Mayada Ritchie, President
120 Members

Severn Town Club,
1410 Ridge Way East
Arnold, MD 21012
Janet Harringman, President
88 Members

Sweet Adelines,
Annapolis Landing,
Riva, MD 21140
Stell Emmert, **
30 Members

Business & Professional Women,
Box 45,
Annapolis, MD 21403
Edith Knight, **
200 Members

MD Association of Elected Women,
1 Newberg Ave.,
Baltimore, MD 21228
Nancy Murphy, ***
100 Members

South Arundel Club,
4909 Chalk Pt. Road,
West River, MD 20778
Mrs. Edward Atkinson, President
25 Members

South Arundel Jrs.,
5461 Greenoak Road,
Lothian, MD 20711
Mrs. William Chaney, Pres.
25 Members

SOURCE:—Local paper & Chamber of Commerce publications

** Indicates information not available